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June 15, 2009

David N. Sundwall, MD  
Executive Director  
Utah Department of Health  
288 North 1460 West  
P.O. Box 141000  
Salt Lake City, Utah 84114-1000

Re: Letter Opinion on Local Jurisdiction Ambulance Service RFP  
Authority

Dear Dr. Sundwall:

You asked me to provide guidance to the Department on questions submitted by Southwest Ambulance.

1. Can Salt Lake City issue an RFP stating that the non-911 services will be provided by the successful applicant?
2. Define the statement "some other means acceptable to the department".

**Background**

In the 1999 general session of the Legislature, SB 54, sponsored by Senator Leonard Blackham, repealed Chapter 8 of Title 26 and enacted Chapter 8a of Title 26. Utah Code Ann. § 26-8a-401 (1999), **State regulation of emergency medical services market**, provides:

- (1) To ensure emergency medical service quality and minimize unnecessary duplication, the department shall regulate the emergency medical service market after October 1, 1999, by creating and operating a statewide system that:

- (a) consists of exclusive geographic service areas as provided in Section 26-8a-402; and
- (b) establishes maximum rates as provided in Section 26-8a-403.

This was intentionally drafted to continue the long-standing Utah public policy that the state should regulate pre-hospital emergency medical services rather than allow free market competition.

In the case of Parker v. Brown, 317 U.S. 341 (1943), the United States Supreme Court set out the state action doctrine. It held that it was inappropriate to apply antitrust rules, primarily designed to regulate business, to limit the sovereign regulatory power of the states.

Thereafter in the case of California Retail Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980), the Supreme Court held that the doctrine shields the conduct of non-state actors undertaken pursuant to a clearly articulated state law that displaces competition with a regulatory scheme. The conduct of the private actors must also be supervised by the state. This led to the "clear articulation" and "active supervision" requirements.

Maintaining exclusive service areas and establishing maximum rates addresses the "active supervision" requirement of the state action doctrine. Legislative action has clearly articulated Utah's policy to prefer a controlled market in this arena.

Prior to 2003, the Utah Department of Health, through the Bureau of Emergency Medical Services and the Emergency Medical Services Committee, regulated the entire market for ambulance services in Utah.

In the 2003 general session, SB 180, sponsored by Senator Curtis Bramble, was enacted. For the first time a distinction between 911 and non-911 ambulance service was drawn.<sup>1</sup> Political subdivisions in counties of the first and second class were permitted to contract for 911 ambulance service in their jurisdiction through a request for proposal.<sup>2</sup> This section was also amended in subsequent sessions.<sup>3</sup>

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<sup>1</sup> 26-8a-405.1(1)(a)

<sup>2</sup> 26-8a-405.1 and -405.2

<sup>3</sup> None of these amendments are relevant to the questions in this letter. 2004, SB 81 Jenkins – rfp issuer may also bid; 2005, SB 216 Bramble – process and fiscal accounting; 2006, SB 183 Eastman – definition of governing body.

### **Types of Service**

Current law only describes two types of service. 911 service is defined.<sup>4</sup> All other ambulance service is then non-911. In actual practice, there are at least three types of service: Calls to the 911 emergency line; unscheduled emergency transports; and scheduled transports that require a level of care that justifies use of an ambulance. There are many transports by non-ambulance providers.

Scheduled transports are usually from one health care facility to another health care facility and are often called inter-facility transports. Most unscheduled emergency transports are also between facilities. One of the basic premises supporting state regulation and controlled prices is the belief that persons cannot bargain for the lowest cost appropriate transport to a health care facility in the midst of a medical emergency. Scheduled inter-facility transports do not follow that premise and bargaining over cost and responsiveness may be possible. Utah law recognizes that the ability to serve an area could be compromised if a provider does not supply all of the ambulance transports in a given area.<sup>5</sup>

May Political Subdivisions Contract for Non-911 Ambulance Services through a Request for Proposal?

Utah Code Ann. § 26-8a-405.2 (2)(c) (2008) speaks to non-911 ambulance service. It states:

(c) The proposed geographic service area for 911 ambulance or paramedic service must demonstrate that non-911 ambulance or paramedic service will be provided in the geographic service area, either by the current provider, the applicant, or some other method acceptable to the department. The department may consider the effect of the proposed geographic service area on the costs to the non-911 provider and that provider's ability to provide only non-911 services in the proposed area.

This provision is only applicable when a political subdivision proposes a geographic service area for 911 service. Subsection (2) of this part deals with Department approval

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<sup>4</sup> 26-8a-405.1(1)(a)

<sup>5</sup> 28-8a-405.1(2)(c) The department may consider the effect of the proposed geographic service area on the costs to the non-911 provider and that provider's ability to provide only non-911 services in the proposed area.

of a proposed request for proposal. The Department may not approve the request for proposal unless the proposal demonstrates how non-911 service will be provided.

Every other instances where a political subdivision's authority to contract for ambulance service is referenced, it is limited to 911 service. See Utah Code Ann. 26-8a-405.1 (1)(a), 405.1(2)(a), 405.2(1)(a), 405.2(1)(c)(ii), 405.2(2)(c).

The general grant of authority at Utah Code Ann. § 26-8a-405.2 to contract states:

(1) (a) A political subdivision may contract with an applicant approved under Section 26-8a-404 to provide 911 ambulance or paramedic services for the geographic service area that is approved by the department in accordance with Subsection (2), if the political subdivision complies with the provisions of this section and Section 26-8a-405.3.

I find no authority in this section to demonstrate that the Legislature intended to grant authority to contract for non-911 service. I therefore conclude that a political subdivision may not contract for non-911 ambulance service through a request for proposal. This conclusion is supported by bills offered in recent sessions of the Legislature to expressly permit contracting for non-911 service or to permit more than one provider for this service in a given geographical area.<sup>6</sup> None of these bills have become law.

Non-911 service is subject to the standards of public convenience and necessity set forth in Utah Code Ann. 26-8a-408, with the incumbent provider allowed to continue unless a competing applicant can demonstrate that the proposed change is in the best interest of the public. This would include cost, quality and access goals established by local governments.<sup>7</sup>

In the case of Salt Lake City, Southwest Ambulance currently provides 911 ambulance service as the successful bidder on a previously issued request for proposal. The current contract could be terminated as early as this year. Salt Lake City provides paramedic service.

Should Southwest or Salt Lake City not continue the contract, Salt Lake City could issue a new request for proposal and choose to bid itself. If no appropriate bid

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<sup>6</sup> 2009, HB 273, Noel; 2008, HB 494, Dougall; 2007, SB 214, Peterson

<sup>7</sup> 26-8a-408(7)

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is received or if Salt Lake chooses not to issue a request for proposal, the department would be obliged to find a provider to supply 911 service in Salt Lake City.

**Define the statement "some other means acceptable to the department."**

As discussed earlier, this language appears in the section where the Department must approve a proposed request for proposal. The overriding concept is avoiding areas that do not receive service.

Prior to the issuance of the request for proposal by Salt Lake City, Gold Cross Ambulance provided 911 and non-911 service within the City. Before the Department approved the request for proposal, it examined the impact on Gold Cross' ability to continue to provide non-911 service.

Hypothetically, if Gold Cross had chosen to abandon non-911 service in Salt Lake City in the face of the proposed request for proposal, Salt Lake City's proposal would not have been approved without a solution.


That solution may have been asking Southwest to agree to provide non-911 service and to apply for a license to perform that service. Sections 26-8a-406 through 26-8a-409 would apply to that application, with the standard public convenience and necessity analysis applied.

Another possible solution would be an agreement between the current provider and a proposed new provider to jointly provide non-911 service. This would be an example of "some other means acceptable to the department."

In any of the above scenarios, it is assumed that no additional parties stepped forward to seek the same service. Nothing would bar this and the provider that best meets the public convenience and necessity would be chosen.

Please let me know if you have additional questions.

Sincerely,

  
DOUG SPRINGMEYER  
Assistant Attorney General  
Chief, Education/Health Division

DS/bk  
cc: Paul Patrick